No. 617

IN THE

Supreme Court of the United States

October Term, 1952

DISTRICT OF COLUMBIA, *Petitioner*

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent, John R. Thompson Company, by its counsel, respectfully urges that the judgment of the United States Court of Appeals for the District of Columbia Circuit be affirmed for the reasons hereinafter stated.

OPINIONS BELOW

The opinion of the Municipal Court for the District of Columbia (R. 4) is not reported. The opinion of the Municipal Court of Appeals for the District of Columbia (R. 25) is reported at 81 A. 2d 249. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 60) has not yet been reported.

JURISDICTION

This Honorable Court has jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit pursuant to Section 1254 of Title 28, United States Code.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct, except that it should be added that the record contains the following Agreed Statement of Facts (R. 17):

> Counsel for the District of Columbia and counsel for the defendant agree that the following are the facts in the above entitled case.
>
> That John R. Thompson Company is a corporation doing business in the District of Columbia; that it is the owner and proprietor of a restaurant known as and numbered 725 14th Street, N. W., Washington D. C.; that it holds a District of Columbia license for the conduct of such restaurant and held such license on February 28, 1950; that Sylvester Becker is Vice-President and Superintendent of the Washington Division of the John R. Thompson Company, Inc. and the local manager of the aforesaid restaurant.
>
> That on the 28th day of February, 1950, while said restaurant was open for business, three persons of the Negro race, Mary Church Terrell, Essie Thompson and Arthur F. Elmer, all agreed to be well-behaved and respectable persons, entered said restaurant and requested to be served; that the defendant, through its local manager, informed each of the three persons aforesaid that it was not the policy of the restaurant

to serve to members of the colored race, and defendant then and there refused to sell or otherwise accommodate the three aforesaid persons, or either of them, solely because of their race and color.

And it is further agreed:

There is no official record of any attempted prosecutions for violations of the terms of the Legislative Assembly Act of June 20, 1872; that upon information and belief there were four such prosecutions, all resulting in convictions in the Police Court but all being reversed in the Supreme Court of the District of Columbia, holding criminal court, or resulted in *nolle pross;* that all four such prosecutions were in the year 1872 and that there have been no further attempted prosecutions under the 1872 Act since that year.

That there is no official record of any attempted prosecutions under the terms of the Legislative Act of June 26, 1873, and, so far as can be learned, there was never an attempt of prosecution under that Act.

And it is further agreed:

That the records of the District of Columbia fail to show that any local restaurant or eating house ever filed with the Assessor of the District of Columbia a printed or other copy of its usual or common prices of articles kept by it for sale, as required by the Act of June 26, 1873, and, so far as is known, no demands were ever made upon local restaurants so to file by the Assessor or other municipal officer.

And it is further agreed:

That the first count of the declarations is based upon the Legislative Assembly Act of June 20, 1872 and the second, third and fourth counts are based upon the Legislative Assembly Act of June 26, 1873.

SUMMARY OF ARGUMENT

The Acts of the Legislative Assembly of June 20, 1872 and June 26, 1873 are not presently enforceable. If it could be held that these Acts were validly enacted, they would have been repealed by the District of Columbia Code of 1901, Act of March 3, 1901, 31 Stat. 1189. The repealing section of that Code, Section 1636, repealed all Acts of the Legislative Assembly with several exceptions, none of which

included the Acts of 1872 and 1873 because those Acts were legislation and were not police regulations. Had the 1901 Code not specifically repealed these Acts, they were impliedly repealed by Section 48 of the same Code, 31 Stat. 1197, relating to the power of the police court to pass sentences, and were also repealed by the District of Columbia General License Law and by the regulations promulgated thereunder, and by the Alcohol Beverage Control Act of 1934. For more than 78 years there have been no prosecutions under the Acts of 1872 and 1873 nor any attempt whatsoever to enforce their provisions prior to 1950, during which time many acts and regulations concerning restaurants have been promulgated, so that these Acts must be considered to have been repealed by a long course of administrative interpretation or by obsolescence.

These Acts, moreover, could never have been validly enacted by the Legislative Assembly. They are legislation, not municipal regulation. The Congress is the legislature for the District of Columbia pursuant to Article I, Section 8, Clause 17, of the Constitution of the United States, and it may not delegate its power as a legislature to any other person or body. The Congress may not constitutionally abdicate or transfer to others its legislative powers. Likewise, the Acts were initially invalid because they provide for the forfeiture of licenses without express authority from the Congress. Irrespective of what body had passed them, they are also constitutionally invalid because they discriminate against the businesses named without any reasonable basis.

ARGUMENT

Introduction

There are two major issues presented by the case, first whether the Legislative Assembly Act of June 20, 1872 and the Legislative Assembly Act of June 26, 1873 were valid when enacted, and, second, if valid, have they been repealed or abandoned. The first question involves important ques-

tions of constitutional interpretation, while the second merely involves the application of the standard canons of statutory construction.

In the Courts below respondent discussed these questions in a chronological order, dealing first with the question of initial validity. In this brief, however, in view of the often enunciated principle of this Honorable Court that it will not express itself upon questions of Constitutional interpretation in cases which can be disposed of upon general principles of law, or upon accepted criteria of statutory interpretation, *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101; *Asbury Hospital* v. *Cass County*, 326 U. S. 207, the respondent will discuss first the non-constitutional issue of repeal or abandonment, which in itself disposes of the case.

I

REPEAL

A. Repeal by the District of Columbia Code of 1901. Act of March 3, 1901, 31 Stat. 1189.

Assuming *arguendo* that the Acts of the Legislative Assembly of 1872 and 1873 were not void, and that they survived until 1901, they were repealed in that year when Congress enacted the basic code of laws for the District of Columbia, Act of March 3, 1901, 31 Stat. 1189.

Section 1 of the 1901 Code provided as follows:

> The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.

It will be observed that this section did not preserve the Acts of the Legislative Assembly. Section 1636 of the Code, however, provided in part as follows:

> All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed except: * * *

Then followed eleven exceptions, only three of which, the third, the fifth, and the eighth, are material here. The third exception reads:

> Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations.[1]

The Acts of 1872 and 1873 were legislation, not "police regulations". They were, in fact, civil rights legislation. These Acts defined and denounced a new offense. That is, they provided that the exercise of certain rights theretofore enjoyed by restaurant proprietors and others should thereafter constitute a crime. Their purpose was to alter the mores of the people of the District of Columbia by legislative fiat. Specifically, their object was to impose upon

[1] The petitioner also argues that since the Acts of 1872 and 1873 impose some duties upon certain officers of the then District of Columbia Government, that they are acts relating to municipal affairs. This argument ignores the language of the third exception which only excepts from express repeal "acts and parts of acts relating to municipal affairs only". These Acts only relate incidentally to duties of public officials, and could not be said to relate to municipal affairs *only*.

the District of Columbia the principle or theory of social equality. They did not attempt to regulate pre-existing rights or duties but rather to create and enforce new rights and duties, general in nature. In so doing, the Acts imposed upon restaurant owners and others a duty to sell to all and thus interfered with their freedom to contract or not to contract with whom they pleased. The Acts were no more municipal ordinances or police regulations than was the Civil Rights Act of 1875, 18 Stat. 335, containing similar provisions, which was enacted by the Congress. Both the Civil Rights Act of 1875 and the Acts of 1872 and 1873 undertook to promulgate a *policy* of social equality and enforce it by criminal penalties. "The essentials of the legislative function are the *determination of the legislative policy* and its formulation and promulgation as a defined and binding rule of conduct". (Emphasis supplied). *Yakus* v. *United States*, 321 U. S. 414 at 424.

That the attempted enactment of the Acts of 1872 and 1873 by the Legislative Assembly was legislation is indicated by this Court's decision in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. In that case the Congress had defined in a general way the policy enunciated by the Act. Nevertheless, this Court in that case said, 293 U. S. at 414-415:

> The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined. It is the transportation in interstate commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question of whether that transportation shall be prohibited by law is obviously one of legislative policy.

The District of Columbia Organic Act of February 21, 1871, 16 Stat. 419, unlike the statute involved in the *Panama Refining Company* case, gave no hint of a policy directive

for the enactment of non-segregation legislation. If in the *Panama Refining Company* case the mere determination of when to make a predetermined policy effective was legislation, the entire determination and enunciation of a non-segregation policy by the Legislative Assembly by its Acts of 1872 and 1873 must be, *a fortiori* legislation.

The Supreme Court of Utah has held that similar attempted enforcement of non-segregation in restaurants by a municipality was legislation, *Nance* v. *Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773. As was so forcefully stated by Chief Judge Stephens in his opinion below (R. 79-81):

> In requiring restaurant keepers, upon pain of fine and license forfeiture, to serve any respectable, well-behaved person without regard to race, color, or previous condition of servitude, the enactments limit the freedom of the restaurant keeper in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling. Before the enactments, he could choose customers according to his own business or personal desire. The enactments lift restaurant keeping, theretofore strictly a private enterprise, to a level of a "public employment"—thereby altering the common law, which required inns, but not restaurants, to serve all travelers. *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906 (1946); *Nance* v. *Mayflower Tavern*, 106 Utah 517, 150 P. 2d 773 (1944); Beale, INNKEEPERS and HOTELS, 1906, §§ 15, 35, 53, 61, 301; Williston, CONTRACTS (Rev. Ed.) v. 4, § 1066, pp. 2964, 2965); 43 C.J.S. INNKEEPERS, § 2, p. 1136. The enactments do not relate in the usual sense of the terms, "to the promotion or protection of the public morals and decency, the securing of the public safety against fires, explosions, riot or disorder, or other dangers to life and limb, the preservation of the public peace and order, the furtherance of sanitation and the safeguarding of the public health" which are the ordinary subjects of municipal regulation. Moreover, the essential object of the enactments was to prevent in restaurants—and in the other businesses enumerated—discrimination on account of race, color or previous condition of servitude, notwithstanding that such dis-

crimination was customary in the District of Columbia at the time the enactments were promulgated. The enactments are in the nature of civil rights legislation. They undertake to establish in the restaurant business, and in the other businesses named, a policy of equal service without respect to race or color, and to enforce that policy by a fine and license forfeiture. Finally, the enactments, though applicable only in the District of Columbia, are, because they are applicable in the Nation's Capital, of national interest. In view of the purpose and effect of the enactments as above described, we think that no other conclusion can reasonably be reached than that they were of the character of general legislation, * * *

This view of Chief Judge Stephens as to the national portance of these Acts is echoed in the petition and in e brief filed by the United States as *amicus*. Petitioner, page 7-8 of its petition says:

"The importance of this case to the people of the entire Nation is manifest. As Chief Judge Stephens pointed out in his opinion,

"* * * the enactments, though applicable only in the District of Columbia, are, because they are applicable in the Nation's capital, of national interest." (R. 82)

The importance to the Nation of solving the problem of racial discrimination in the United States, and particularly in the District of Columbia, is so great that the President devoted a portion of his State of the Union Address to that subject. The President said:

"Our civil and social rights form a central part of the heritage we are striving to defend on all fronts and with all our strength.

"I believe with all my heart that our vigilant guarding of these rights is a sacred obligation binding upon every citizen. To be true to one's own freedom is, in essence, to honor and respect the freedom of all others.

"A cardinal ideal in this heritage we cherish is the equality of rights of all citizens of every race and color and creed.

"We know that discrimination against minorities persists despite our allegiance to this ideal. Such discrimination—confined to no one section of the Nation—is but the outward testimony to the persistence of distrust and of fear in the hearts of men.

"This fact makes all the more vital the fighting of these wrongs by each individual, in every station of life, in his every deed.

"Much of the answer lies in the power of fact, fully publicized; of persuasion, honestly pressed; and of conscience, justly aroused. These are methods familiar to our way of life, tested and proven wise.

"I propose to use whatever authority exists in the office of the President to end segregation in the District of Columbia, including the Federal Government, and any segregation in the Armed Forces."

(Vol. 99, Congressional Record, February 2, 1953, No. 18, p. 783, daily issue; House Document No. 75, 83rd Congress, 1st Session, p. 13.)

The United States in its brief in support of certiorari at pages 12-13, also quoted from the President's address to Congress and added:

Several hundred thousand Federal employees, representing every segment of our population, work and live in the District of Columbia area. It is the established policy of the United States that its employees shall be hired, and shall work together, without regard to any differences of race or color.

Neither petitioner nor the United States can reasonably differ with Chief Judge Stephens' opinion that Acts determinative of a question of such interest to the nation are legislation,[2] not mere police regulations.

[2] It should be remembered that we are not now discussing the question of delegability of legislative power but merely dealing with the question of whether these Acts were legislation, irrespective of how enacted.

This Court in *O'Donoghue* v. *United States*, 289 U. S. 16 at 539 emphasized that the District of Columbia became "the city, not of a state, not of a district, but of a nation." The determinations of policy with respect to racial segregation in such a city is clearly a matter of national importance. It is unrealistic to suggest the propriety of permitting a decision of such magnitude by way of police or municipal regulation in the capital city of one hundred fifty-eight million people.

The courts of the District of Columbia have held in many cases that attempted regulations, analogous to the Acts of 1872 and 1873, constituted general legislation and not police regulations or municipal ordinances. *District of Columbia* v. *Saville*, 1 MacArthur (8 D.C.) 581; *Roach* v. *Van Riswick*, MacArthur & M. (11 D.C.) 171; *Smith* v. *Olcott*, 19 App. D.C. 61; *Coughlin* v. *District of Columbia*, 25 App. D.C. 251; *United States* v. *Cella*, 37 App. D. C. 433; *Patrick* v. *Smith*, 60 App. D. C. 6, 45 F. 2d 924.

Whether or not the Acts of 1872 and 1873 were legislation or municipal ordinances or regulations depends upon their inherent character and nature and not solely upon their geographical scope. The brief of the United States as *amicus curiae* erroneously assumes that the geographical test is the only one to be applied. This so-called test is of no value since the scope of all acts of the Legislative Assembly was limited to the territorial confines of the District of Columbia so that under this test all enactments of the Legislative Assembly would be classified as municipal regulations regardless of subject matter. As has been demonstrated, however, the subject matter of the Acts under review was such that they must be held to have been attempted legislation.

Even if the Acts of 1872 and 1873 could be called municipal regulations in any sense of the term, it is clear from the language of Section 1636 of the 1901 Code, without reference to any extrinsic criteria, that the words "police regulations" and "acts relating to municipal affairs only"

in the third exception were used in a sense too restrictive to include the Acts here in question. This is apparent from analysis of the eighth subsection of Section 1636 of the 1901 Code which saved from repeal the following acts:

> An Act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; and act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health.

Were the third exception board enough to save the Acts of 1872 and 1873 it would have saved, *a fortiori*, those listed in exception eight. Congress thus plainly demonstrated that the meaning of "police regulations" and "acts relating to municipal affairs only", which were saved in the third exception was not broad enough to include the Acts

ere in question.[3] To construe Section 1636 differently is o make the eighth exception unnecessary.

The fifth exception of Section 1636 of the 1901 Code exmpted from express repeal "All penal statutes authorizg punishment by fine only or by imprisonment not exeeding one year, or both." The Acts of 1872 and 1873 ay have been "penal statutes" but under each Act the enalty for failure to serve food and drink without disrimination was both a fine *and forfeiture of the violator's cense.* The forfeiture of the license was a part of the enalty. Each Act provided in mandatory terms that a iolator "shall be fined $100 and forfeit his * * * license." he very use of the term "forfeit" implies a penal sanction. *entral Nat. Bank* v. *Dallas Bank & Trust Co.*, 66 S. W. l 474 (Tex. Civ. App.); *Southern Ry. Co.* v. *Inman*, 11 a. App. 564, 75 S. E. 968. The suggestion made below by he District of Columbia that the provision for license revoation may be remedial is unsound. It is difficult to see ow putting a restaurant proprietor out of business for year would remedy his failure to serve all comers without discrimination. During the suspension of his license, e obviously would serve no one. In short, we think it too lain for argument that the provision for the forfeiture of he license of a restaurant proprietor was intended to be, nd was, a penal sanction, in short a threat to induce comliance, not a remedy after violation. Since this forfeiture as a part of the penalty imposed by the Acts of 1872 and 873 they were not saved by the fifth exception under ection 1636 of the Code of 1901, which preserved only tatutes authorizing punishment by fine or imprisonment r both.

Petitioner relies upon Section 1640 of the Code of 1901 o save these acts of the Legislative Assembly from repeal. his section, unlike Section 1636 does not refer to the acts

[3] See also Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 73, holding that attempted municipal civil rights legislation was ot an act relating to "municipal affairs" or a "police regulation".

of the Legislative Assembly, but to municipal ordinances or regulations, such as might have been adopted by the Commissioners of the District of Columbia prior to 1901. Section 1636, on the other hand, clearly and unambiguously repeals "all acts and parts of acts of the legislative assembly", with the exceptions previously discussed. Being specific, it covers the entire subject, leaving no need to construe Section 1640 so as to create any ambiguity.[4] Sections 1636 and 1640 are completely consistent. In this respect it may be pointed out that repeal by Section 1636 of the Code of 1901 is an express repeal of all acts of the Legislative Assembly, with exceptions, not a repeal by implication, as suggested by petitioner.

Ignoring the fact that by its terms Section 1636 applies to all acts of the Legislative Assembly, so as to leave no problem of construction, the United States as *amicus* devotes a considerable portion of its brief to the argument that the words of Section 1636 do not mean what they say, and that it did not cover all acts of the Legislative Assembly. This argument is based on a claim that the Congress originally intended to codify the municipal regulations as well as the statutes applicable to the District, in accordance with recommendations of Judge Walter W. Cox. This rather ingenious argument contains several patent fallacies. First, it assumes these Acts were municipal regulations, not legislation, which they were. Secondly, it ignores the express repeal of all acts of the Legislative Assembly, with exceptions not pertinent, in Section 1636. Thirdly, *amicus* admits that Judge Cox, in working up his draft of a proposed code relied upon Albert & Lovejoy's *Compiled Statutes*, Gov't Printing Office, 1894, which included the

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[4] But it might be also added that even were Section 1640 applicable to Acts of the Legislative Assembly, that the Acts of 1872 and 1873 are inconsistent with a portion of the 1901 Code, in that the penalty provided in those Acts exceed the jurisdiction of the police court as set forth in Section 48 of the 1901 Code. See the discussion of implied repeal by that section in the text, *infra*.

Legislative Assembly Acts; yet the Acts of 1872 and 1873 were not incorporated into either section of Judge Cox's proposed code.

For the various reasons stated, it is submitted that the Acts of the Legislative Assembly of 1872 and 1873 were *expressly repealed* by Section 1636 of the District of Columbia Code.

These Acts also were repealed by implication by Section 48 of the Code of 1901, 31 Stat. 1197. A part of the penalty provided by the Acts of 1872 and 1873 is forfeiture of the license of a violator. Section 4 of the Act of 1873 provides for prosecution in the "Police Court of the District of Columbia." The present Criminal Division of the Municipal Court for the District of Columbia, successor of the Police Court, has no power to impose the mandatory penalty provided, $100.00 and forfeiture of license.

The jurisdiction of the Criminal Branch of the Municipal Court is defined in Section 48 of the Code of 1901. By that section, the then Police Court was given the power "to enforce any of its judgments by fine or imprisonment or both"; but no authority was given the Court to impose a sentence involving the forfeiture of a license in addition to a fine or imprisonment.

Chief Judge Cayton in his opinion in the Municipal Court of Appeals (R. 31) suggests that the absence of power in the Municipal Court to impose the penalty of forfeiture of license is immaterial because the D. C. Commissioners may do so as in the case of revocation of an automobile operator's permit upon conviction of operating under the influence of liquor, Section 40-609 of the D. C. Code (1951); or for failure to satisfy a judgment after an auto accident, Section 40-403, *Id.*; or for conviction of violating the Loan Shark Law, Section 26-606. *Id.*

The learned Chief Judge, however, apparently overlooked basic differences between those acts and the Legislative Assembly Acts of 1872 and 1873. In Section 40-609 the clerk of court is directed to certify the conviction to the

Director of Motor Vehicles who is *expressly* directed to revoke the permit. Section 40-403 likewise has an express direction to the Commissioners or their designated agent to revoke, and, moreover, applies to civil judgments, not to a criminal situation.

In Section 26-606, moreover, the revocation is for violation with or *without* conviction, and there is *express* authority *to the Commissioners* to revoke, *after a civil hearing.* There is little analogy here to the Legislative Assembly Acts in question.

The revocations in the three code sections cited by the learned Chief Judge, moreover, are remedial, while the forfeiture in the Legislative Assembly Acts is clearly penal as it is obvious that the non-service of patrons will not be remedied during the year of forfeiture. It is plainly a deterrent rather than a remedy, and part of the punishment to be imposed. The very use of the word "forfeiture" rather than revocation, the term used in the cited code sections, would imply that it was a punishment if it were not clear from the Acts themselves. *Central National Bank* v. *Dallas Bank & Trust Co.,* (Tex. Civ. App.) 66 S. W. 2d 474; *Southern Railway* v. *Inman,* 11 Ga. App. 564, 75 S. E. 908.

The sentence of license forfeiture is by far the most serious penalty of the Acts. That having been repealed by Section 48, the Acts fail in their entirety.

Primarily because they were expressly repealed, and because they were also impliedly repealed, therefore, neither of these Acts survived the 1901 Code.

B. The Acts of 1872 and 1873 Were Repealed By the District of Columbia General License Law and By Regulations Promulgated Thereunder.

Even if they survived the Code of 1901, the Legislative Assembly Acts of 1872 and 1873 were repealed by the General License Law now in force in the District of Columbia.

Originally enacted in 1902, and reenacted in 1932, the General License Law is now found in the District of Columbia Code (1951), Sections 47-2301, *et seq.* This Act embodies a complete plan for the licensing of businesses, including the restaurant business and others covered by the Acts of 1872 and 1873, and for the revocation of such licenses by the Commissioners. Thus, even if there were no express inconsistencies between the present law and the old Acts of the Legislative Assembly, the present law would supersede and repeal the Acts. In this connection, see *Board of Education* v. *Borgen*, 192 Minn. 367, 256 N. W. 894; *Swift & Co.* v. *Sones*, 142 Miss. 660, 107 So. 881; *State* v. *Coblentz*, 167 Md. 523, 175 Atl. 340; *Godfry* v. *Bldg. Com'r.*, 263 Mass. 589, 161 N. E. 819, *Eckloff* v. *District of Columbia*, 4 Mackey (15 D. C.) 572, affirmed 135 U. S. 240; *Callan* v. *District of Columbia*, 16 App. D. C. 271; *Stevens* v. *Stoutenburgh*, 8 App. D. C. 513; *Gilbert* v. *Morgan*, 7 Mackey (18 D. C.) 296; *Fulton* v. *District of Columbia*, 2 App. D. C. 431.

Moreover, there are substantial inconsistencies between the General License Law and the Acts of 1872 and 1873. Section 47-2301 of the License Law requires licenses of all businesses upon which a license fee or tax is imposed by the Act. Under Section 47-2327(c) the defendant is required to pay a license fee and obtain a license to operate its business. Section 47-2345 expressly authorizes the Commissioners "to revoke any license issued hereunder when, in their judgment, such is deemed desirable in the interest of public decency or the protection of lives, limbs, health, comfort, and quiet of the citizens of the District of Columbia, or for any other reason they may deem sufficient." This provision, authorizing the Commissioners to revoke licenses for certain causes which in the exercise of their judgment they may deem sufficient, is inconsistent with the provisions for the *mandatory* forfeiture of licenses contained in the Acts of 1872 and 1873. The Legislative Assembly Acts provide that the restaurant license *must*

be forfeited upon conviction, while the General License Law provides they shall be forfeited for certain causes *in the discretion* of the Commissioners. These latter reasons are not necessarily the same as the former. The later expression of the will of the Congress that revocation shall be discretionary must take precedence over the earlier Legislative Assembly provision that forfeiture for this cause is mandatory.

Also, Section 47-2345 of the General License Law provides that the Commissioners may adopt regulations in furtherance of the purpose of the Act, and Section 47-2347 provides criminal penalties for violation of the Act or of such regulations. The penalties provided are a fine of not more than $300 or imprisonment for not more than ninety days. Here again we have an inconsistency with the penal provisions of the Acts of 1872 and 1873 which prescribe punishment by $100 fine and license forfeiture.

Under the provisions of Section 47-2345 of the General License Law, the Commissioners of the District of Columbia have promulgated regulations dealing with the restaurant business. The current restaurant regulations, promulgated by the Commissioners on April 1, 1942, are set out in the Addendum at pages 34-43 of this brief. See also Article 603-04 of the regulations promulgated by the Commissioners under the Egress Act of December 24, 1942, Public Law 833, 77th Congress, and Section 2 of Article XVII of the current District of Columbia Police Regulations relating to fireproofing. For prior regulations see *Laws and Regulations Relating to Public Health in the District of Columbia*, Government Printing Office, 1930, pages 23, 25, 248 (barber shops), 291, 314. The Municipal Court and the Municipal Court of Appeals should have judicially noticed such regulations. *Tipp* v. *District of Columbia*, 69 App. D. C. 400, 102 F. 2d 264. On review from those Courts, this Honorable Court may judicially notice them. Without discussing the regulations in detail, it is enough to say that the Commissioners have made no at-

tempt to impose upon restaurants the commands of the Acts of 1872 and 1873. They have dealt with matters such as sanitation and safety from fire and overcrowding but have not attempted to articulate and implement by regulation the social theory of the old Legislative Assembly Acts, nor have the Commissioners, so far as it can be ascertained, ever revoked a restaurant license for conduct by a restaurant proprietor which would constitute a violation of the Acts of 1872 and 1873. Thus there has been a continuing administrative interpretation of the law by the Commissioners which is completely inconsistent with the theory that the Acts of 1872 and 1873 are still in force.

Lest it be said that regulations can not repeal prior legislative acts, let it be remembered that the petitioner, to support the initial validity of the Acts and their non-repeal by the 1901 Code, must argue that they themselves were earlier regulations.

C. The Acts of 1872 and 1873 Were Repealed By the Alcoholic Beverage Control Act of 1934.

The Alcoholic Beverage Control Act of 1934, District of Columbia Code (1951) Section 25-101 *et seq.*, provided for the licensing of hotels, restaurants and taverns which sell intoxicating liquors. Revocation or suspension of such licenses by the Alcoholic Beverage Control Board was *specifically* authorized by Congress in compliance with the rule laid down in *United States Ex. Rel. Daly* v. *MacFarland*, 28 App. D. C. 552, *infra*, with provision for an appeal to the Commissioners from any decision of the Board revoking or suspending a license for a period of more than thirty days. D. C. Code (1951) Section 25-106. Examination of the Act shows that it sets up a comprehensive scheme for the licensing and regulation of the business of selling intoxicating liquor in restaurants and other establishments covered by the Act. We therefore find again that a recent statute has completely covered the field of the Acts of 1872 and 1873, at least insofar as the sale of liquor is concerned. To this extent the Acts must be repealed by im-

plication. Since it is unreasonable that a customer can demand food and not intoxicants, the remainder of the Acts must fall also.

Moreover, there are specific and direct inconsistencies between the Alcoholic Beverage Control Act and the Acts of 1872 and 1873. Under the Alcoholic Beverage Control Act, for example, intoxicating liquor may not be sold to any person under the age of twenty-one or beer or light wines to any person under the age of eighteen. D. C. Code (1951) Section 25-121. Under the Acts of 1872 and 1873, however, the proprietor of a bar or restaurant could not refuse to sell to any well-behaved person solely upon the ground of his age. In other words, we have presented an anomalous situation: if the proprietor of a restaurant or tavern complies with the Alcoholic Beverage Control Act by refusing to sell to a well-behaved minor, then he violates the Acts of 1872 and 1873.

Without attempting to multiply instances of inconsistencies between the Alcoholic Beverage Control Act and the Acts of 1872 and 1873, we submit that absurd consequences must result if the old Acts are held to be still in effect. The sensible conclusion, and we think the only reasonable conclusion, is that the old Acts are no longer in force.

D. These Acts Have Been Repealed by a Long Course of Administrative Interpretation or by Obsolescence

In conclusion, on the subject of repeal, it should be emphasized that for more than seventy-eight (78) years there have been no prosecutions under the Acts of 1872 or 1873 (R. 18). Nor has there been any attempt whatever to enforce any provisions of these Acts after the failure of four prosecutions under the earlier Act in 1872 (R. 18). No restaurant has been required to post a schedule of prices, as required by the Acts, no reports of prices have been filed or required to be filed with the Assessor of the District of Columbia (R. 18), and in general the Acts have become obsolescent and been forgotten. They were resurrected for

this particular prosecution. We submit that the failure of the authorities to enforce or attempt to enforce the Acts for such a long period of time constitutes an administrative interpretation that the Acts were not in force and effect. See the opinion of Circuit Judge Prettyman below (R. 89) and *District of Columbia* v. *Robinson*, 30 App. D. C. 283 and *Reese* v. *Cobb*, 105 Tex. 399, 403. It should be remembered that to have been validly enacted and to have survived the District of Columbia Code of 1901 these Acts must be held to have been mere municipal regulations, not legislation. While there may be some argument, *Reese* v. *Cobb*, *supra* to the contrary, whether statutes can become obsolete, or be abandoned by non-user, it would appear that obsolete and abandoned regulations could not be resurrected after 78 years. To rule otherwise would place an intolerable burden on the citizen with respect to regulations having criminal sanctions.

It is interesting to note that in *Coughlin* v. *District of Columbia*, 25 App. D. C. 251 at 253 the Court of Appeals was not impressed by the claim advanced by the District of Columbia that a regulation under attack was really the resurrection and re-enactment of an old municipal ordinance of the City of Washington. Apparently the Court felt that such old and unused regulations do become obsolete with age.

II

THE ACTS WERE VOID AB INITIO.

A. The Acts of the Legislative Assembly in Question Were Void, Being Acts of General Legislation as Distinguished From Mere Police Regulations or Municipal Ordinances and Therefore Beyond the Power of the Legislative Assembly to Enact.

The power and authority of the Legislative Assembly were derived from the Act of Congress of February 21, 1871, 16 Stat. 419, Ch. 62, which created the Assembly. Specifically, the right of the Legislative Assembly to enact the two measures under review—if that right existed at all—flowed from Section 18 of the Statute, which provided:

> Section 18. And be it further enacted, that the legislative power of the District shall extend to all rightful subjects of legislation within the said District, consistent with the Constitution of the United States and the provisions of this Act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the Tenth Section of the First Article of the constitution of the United States; but all acts of the Legislative Assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislalation over said District in as ample manner as if this law had not been enacted.

It is settled that while the Congress may delegate to the Government of the District of Columbia the power to make municipal and police regulations, Congress, under the Constitution having exclusive legislative power over the District of Columbia, cannot delegate to the District the power to enact legislation.

Congress may not delegate to any other governmental body its power as a legislature. In *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 at 692, this Court said:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

Again in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 at 421 this Court said, "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested." It is submitted that the Congress would indeed have abdicated its essential legislative functions if the local government of the District of Columbia had been empowered to enact civil rights legislation.

In *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 at 541-2 this Court stated:

> "To summarize and conclude on this point: § 3 of the Recovery Act is without precedent. It supplies no

> standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of Codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of general aims of rehabilitation, correction and expansion described in § 1. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

See also *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311-12; *Currin* v. *Wallace*, 306 U. S. 1, 15.

The foregoing cases related to attempted delegation of legislative power to members of the Executive Branch of the Government, especially to the President. This Court has made it clear, however, that the principle is broader, that it relates to attempted delegation of legislative power by Congress to any body, presently existing, or to be created. In the *Panama Refining Co.* case, *supra*, this Court, said, at 420:

> "The point is not one of motives but of Constitutional authority, for which the best of motives is not a substitute. While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by § 9 (c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose."

The Court has recognized the principal that the Congress as a legislature for the District of Columbia may not

delegate its legislative power. This principal has also been recognized by the Courts of the District of Columbia and by counsel for petitioner in his oral and written opinions to Committees of the 80th Congress.[3] This Court said in a case involving an Act of the Legislative Assembly of the District of Columbia, *Stoutenburgh* v. *Hennick*, 129 U. S. 141, at 147:

> It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.
>
> Congress has express power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia "a body corporate for municipal purposes" could only authorize it to exercise municipal powers; and this is all that Congress attempted to do.

Petitioner, and the United States as *amicus* argue that the *Stoutenburgh* case is not a square holding, because the Legislative Assembly Act there involved attempted to regulate interstate commerce. From a reading of the entire opinion, and especially the dissenting opinion of Mr. Justice Miller, however, it is evident that this Court ruled that

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[3] Hearings before the Subcommittee on Home Rule and Reorganization of the Committee on the District of Columbia of the House of Representatives, 80th Cong., 1st Sess. pp. 240 *et seq.*; Joint Hearings before the Subcommittees on Home Rule and Reorganization of the Senate and House Committees on the District of Columbia, 80th Cong., 2d Sess. pp. 25-8.

Congress could only delegate to, and in fact had only delegated to, the Legislative Assembly the power to enact municipal regulations, and that Congress could not delegate legislative power. See also *Metropolitan R.R. Co.* v. *District of Columbia*, 132 U. S. 1.

For the past seventy-five years the courts of the District of Columbia have uniformly held that the Congress could not delegate its legislative power over the District, and that purported acts of the Legislative Assembly which were more than municipal regulations were void.

The Court of Appeals for the District of Columbia in *Smith* v. *Olcott, supra*, 19 App. D. C. 61 at 75 said:

> "Congress has express power "to exercise exclusive legislation in all cases whatsoever," over the District of Columbia, thus possessing the combined powers of a general and of a State government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia "a body corporate for municipal purposes," could only authorize it to exercise municipal powers.

That Court's predecessor had made similar rulings, *Roach* v. *Van Riswick, MacArthur and M.* (11 D.C.) 171; *District of Columbia* v. *Saville*, 1 *MacArthur* (8 D.C.) 581.

Petitioner and the United States as *amicus* argue that cases in this Court and in the United States Court of Appeals for the Ninth Circuit respecting the power of the territorial legislatures of the several territories to enact legislation are pertinent to the case at bar, citing cases such as *Binns* v. *United States*, 194 U. S. 486; *Maynard* v. *Hill*, 125 U. S. 190; *Territory of Alaska* v. *First Natl. Bank*, 22 F. 2d 377 (C.A. 9th). These cases do not discuss the principle of the delegation of legislative power by the Congress. It is submitted that unlike Article I, Section 8, Clause 17, the section applicable to the territories does not necessarily make Congress the legislature for the territories, but leaves it free to select or create a legislature in each territory or

constitute itself such legislature. Unlike Article 1, Section 8, Clause 17, applicable to the District of Columbia, Article IV, Section 3, Clause 2, merely provides that "the Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territories." Congress, in its discretion, might well include among the "needful Rules and Regulations" for a particular territory, one providing for the exercise of legislative power by a territorial legislature.

A comparison of the two clauses indicates that the framers of the Constitution did not intend that the District of Columbia be considered a territory. This Court has had occasion in comparing the status of the Federal judiciary in the District of Columbia and the territories, to indicate the basic difference between Article IV, Section 3, Clause 2, on the one hand, and Article I, Section 8, Clause 17, on the other. In *O'Donoghue* v. *United States*, 289 U. S. 516 at 538-40 this Court said:

> In the District clause, unlike the territorial clause, there is no mere linking of the legislative processes to the disposal and regulation of the public domain—the landed estates of the sovereign—within which transitory governments to tide over the periods of pupilage may be constituted, but an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental. The District is not an "ephemeral" subdivision of the "outlying dominion of the United States," but the capital—the very heart—of the Union itself, to be maintained as the "permanent" abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states, and for a future immeasurably beyond the prophetic vision of those who designed and created it.
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> * * * * * * * * *
>
> The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense,

> and the city organized under the grant became the city, not of a state, not of a district, but of a nation. In the same article which granted the powers of exclusive legislation over its seat of government are conferred all the other great powers which make the nation, including the power to borrow money on the credit of the United States.

As this Court pointed out, the power of Congress as the legislature of the District of Columbia is found in the same article as its other great powers. If it cannot delegate its power to enact legislation respecting interstate and foreign commerce, or to declare war, or the other powers conferred by Article I, Section 8, it cannot delegate its power to exercise legislation over the District of Columbia.

That the Legislative Assembly Acts of 1872 and 1873 were legislation is clear. This has been demonstrated in the first subsection of Section I of this brief. It is argued, however, that any enactment which is of "local" geographic application is a municipal regulation, rather than legislation. Under this criterion, there would be no legislation in existence in the District of Columbia; its entire Code of 1901, as amended from time to time, would consist of municipal regulations, for this Code is applicable only within the territorial limits of the District of Columbia. With respect to the attempted use of the geographic criterion, the Court of Appeals of the District of Columbia said in *United States* v. *Cella*, 37 App. D. C. 433 at 435-6:

> When, therefore, Congress required prosecutions for violations of statutes in the nature of police or municipal regulations to be in the name of the District of Columbia, it undoubtedly had in mind such local regulations as were peculiarly applicable to conditions here existing. It did not, we think, intend to require or permit prosecutions under general penal statutes to be in the name of the District of Columbia, *even though the territorial scope of such statutes was restricted to the District.* A statute making it an offense for a motor vehicle to exceed a certain limit of speed within the city limits would clearly be a penal statute in the nature

> of a police regulation. Such a statute would be designed to regulate the speed of motor vehicles in accordance with the requirements of local conditions. The bucket shop statute under consideration, however, is of a different character. We find that statute in the chapter of the Code devoted to crimes and punishments, and in a sub-chapter governing offenses against public policy. The commission of the offense would be as much against public policy in one place as in another; in other words; *while the statute is local in its application, it deals with a subject-matter general in character.* (Italics added)

The absurdity of applying any sort of a geographic test in the District of Columbia leaves but one test, the subject-matter test as previously discussed in Section 1 of this brief. That test demonstrates that these Acts were attempted legislation. The very reasons urged by petitioner and the United States in support of certiorari, quoted in Section I above, show that the subject-matter of the Acts is one of general and national importance, and not an appropriate subject for police or municipal regulation.

Nevertheless, the United States throughout its brief on the merits, refers to an alleged power of Congress to delegate "local legislative power." An analysis of the brief of the United States discloses that the expression "local legislative power," as used in this connection, means nothing more or less than the power to enact municipal ordinances. Referring to this loose use of the word "legislative" in the dissenting opinion in the Court below, Circuit Judge Prettyman said (R. 97):

> They say, first, that the Legislative Assembly was a legislative body. But, of course, it could not be a true legislative body. Under the Constitution the Congress is, and can be, the only legislative body for the District of Columbia. The Assembly was legislative in the sense that the word applies to the adoption of municipal ordinances, and in that sense alone. So solution of the problem whether the enactments of 1872-73 were legislation in a general sense or were municipal regu-

latory ordinances is not advanced in the least by saying that the Assembly was a "legislative" body.

It is submitted that the Acts in question were general legislation, the power to enact which could not be constitutionally delegated by the Congress.

B. The Acts of 1872 and 1873 Were Void as an Attempt to Provide for the Forfeiture of Licenses in the Absence of Express Congressional Authority for the Enactment of Such a Provision.

The Acts of 1872 and 1873 both provided that a violator should forfeit his license to do business, and made it unlawful for any officer of the District of Columbia to reissue the license for one year thereafter. It is submitted that even without regard to constitutional questions and limitations, these provisions were beyond the power of the Legislative Assembly.

Section 18 of the Act of Congress of February 21, 1871, which defined the authority of the Legislative Assembly, purported to confer upon the Assembly power to legislate upon all rightful subjects, and other sections of the Act conferred certain specific powers upon the Assembly; but neither Section 18 or any other provision of the Act authorized the Assembly to provide for the forfeiture or revocation of licenses. Apart from the restrictive construction which as we have seen must be placed upon the grant of powers embodied in Section 18, so as to bring it within constitutional limitations, it is clear from the cases in the District of Columbia that such general delegation of power to the Government of the District of Columbia will not sustain regulations providing for the revocation of licenses or restricting the right of licensees to pursue their callings.

United States ex rel Daly v. *MacFarland*, 28 App. D. C. 552, *supra*, held invalid a regulation promulgated by the Commissioners of the District of Columbia which provided for the revocation of a plumber's license under certain circumstances. While the Court found that the Commissioners had statutory authority to license plumbers and to regulate

the business of plumbing, *the Court nevertheless held that the Commissioners had no authority to promulgate and enforce the regulation providing for the revocation of a plumber's license, since the statute contained no express provision for such revocation.*

The Court said, 28 App. D. C. 561 at 562:

> It will be observed that these Acts taken together are comprehensive, and cover not only the licensing of plumbers and the practice of plumbing, but also specify the authority of the Commissioners in respect thereto. The constitutional guaranties of the liberty and property of the individual undoubtedly include and protect him in the exercise of his right to earn his living by following a lawful calling, and this right is subject only to reasonable control. That such a license as was revoked in this case is a species of property goes without saying. The right to forfeit this property by the revocation of the license must clearly appear, or it must be held not to exist. Judge Dillon says (sec. 345):
>
> > A corporation, under a general power to make by-laws, cannot make a by-law ordaining a forfeiture of property. To warrant the exercise of such an extraordinary authority by a local and limited jurisdiction, the rule is reasonably adopted that it must be *plainly*, if not, indeed, *expressly*, conferred by the legislature.
>
> Certainly such power will not be presumed to exist in statutes in restraint of the ordinary and legitimate avocations of life, avocations in which the mass of human toilers gain their livelihood and contribute to the welfare and happiness of society. In *Greater New York Athletic Club* v. *Wurster*, supra, the court held that a grant of power to abridge and curtail the exercise of the right of the individual to engage in or pursue a business or calling lawful in itself can only be justified and sustained on the theory that the exercise of such power is necessary to the public welfare and safety, and such power cannot be presumed, but must be clearly expressed.

In *United States ex rel. Kreh* v. *Ingham*, 38 App. D. C. 379, the same Court said, at page 380:

> The sole question presented is whether more than one solicitor's license may be issued to one person, under the provisions of sec. 655 of the Code (31 Stat. at L. 1293, Chap. 854); in other words, whether it was intended by that section to limit and restrict the activities of an insurance solicitor to a single company. The calling of such a solicitor being lawful and subject only to reasonable regulation, the intent of the law making power to abridge or curtail the exercise of the right to pursue that calling ought clearly to appear, and not be presumed. *United States ex rel. Daly* v. *MacFarland*, 28 App. D. C. 552; *Drake* v. *United States*, 30 App. D.C. 312.

See *Patrick* v. *Smith*, 60 App. D. C. 6, 45 F. 2d 924, holding that authority in the Public Utilities Commission to require a hacker to furnish a bond of indemnity insurance or a statement of financial responsibility, in order to secure a license to operate a taxicab, would not be implied from a broad statutory grant of power to the Commission. See also *Hutchins Mut. Ins. Co.* v. *Hazen*, 70 App. D. C. 174, 103 F. 2d 53.

C. The Acts of the Legislative Assembly in Question Were Void for the Reason That They Undertook to Set Up and Apply Unreasonable and Arbitrary Classifications and Distinctions.

It is fundamental that legislation and regulations must deal alike with all persons within their scope who are similarly situated. Classification for legislative purposes must have some reasonable basis. Thus the legislature might fix the age at which persons should be deemed competent to contract for themselves, but no one would claim that competency to contract could be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and unreasonable and therefore invalid. By the same token, although the legislature may exempt certain persons from the scope of a penal statute, such an exemption must be based upon some reasonable

classification, and may not be arbitrary so as to confer a special privilege upon one while denying it to another. A statute which regulates A may not exempt B unless the exemption rests upon some difference between A and B, which furnishes a reasonable basis for the classification. *Truax* v. *Corrigan,* 257 U. S. 312; *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; Compare *Barbier* v. *Connolly,* 113 U. S. 27.

Tested by these fundamental principles, the Acts of 1872 and 1873 were invalid. The Act of 1872 applied to restaurants, hotels, ice cream saloons, soda fountains, barber shops and bath houses. Bar rooms which were not in hotels were not subject to Section 3 of that Act although subject to Section 1. What reasonable basis could there be for requiring the keeper of a bar in a hotel to conform to the Act, while exempting the keeper of the bar next door, which was not connected with the hotel from Section 3 of the Act? Furthermore, what reasonable ground could exist for applying Section 3 of the Act to an ice cream saloon or soda fountain but not to the bar room next door?

That the exemption of bar rooms from the Act of 1872 was prejudicial to restaurants and hotels cannot be denied. Had the Act been enforced against them, no hotel or restaurant could have sold liquor in competition with bar rooms. Hotels and restaurants would have had social equality while bar rooms had the business.

Apparently recognizing that the omission of bar rooms from the Act of 1872 was inequitable and unreasonable, the Act of 1873 specifically included them. This Act, however, did not apply to hotels and was therefore subject in another way to the same vice found in the previous Act. Moreover, no valid reason appears why the proprietors of restaurants, eating houses, bar rooms, ice cream saloons and soda fountain rooms should be made subject to the Act, while the proprietors of butcher shops, grocery stores, dry goods stores, hardware stores and other purveyors of necessaries were exempt. If the purveyor of soda water is re-

quired to sell to all comers under penalty of the law, then why should the same rule not apply to one who sells meat or potatoes or milk or clothes or kitchen utensils? If the object of the Act was to protect and maintain the health, safety and morals of the community, as petitioner argues, was free access to soda water more important to this end than freedom to purchase meat, bread and clothing?

CONCLUSION

The Acts of the Legislative Assembly of 1872 and 1873 were attempted legislation. As such they were void because Congress could not delegate legislative power to that body, and in any event they were expressly repealed by the District of Columbia Code of 1901. Even if they had been Municipal regulations, they were so repealed, as they were not "police regulation" or "acts relating to municipal affairs only" as those terms were used in Section 1636 of the 1901 Code.

The Acts were also void *ab initio* because the Legislative Assembly was given no express power to forfeit licenses, and because they were discriminatory, and were also repealed by implication by another part of the 1901 Code, or by later statutes or regulations, and had become obsolete, or been abandoned, by almost a century of disuse.

For these reasons the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM

Current District of Columbia Restaurant Regulations Promulgated April 1, 1942.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICES
WASHINGTON

April 1st, 1942.

ORDERED:

That for the purpose of regulating the establishment, maintenance and operation of restaurants, delicatessens and catering establishments in the District of Columbia, the following regulations are hereby adopted:

REGULATIONS TO GOVERN THE ESTABLISHMENT AND MAINTENANCE OF RESTAURANTS, DELICATESSENS AND CATERING ESTABLISHMENTS IN THE DISTRICT OF COLUMBIA

Section 1. Definitions: The following definitions shall apply to the interpretation and enforcement of these regulations.

A. Restaurant: The term "restaurant" shall mean a place where food, drinks or refreshments are sold or prepared and sold to persons to be consumed on the premises where sold: provided, however, that this definition shall not be interpreted to include boarding houses and private homes.

B. Boarding Houses: The term "boarding house" shall mean every building or structure, or any part thereof, used as, maintained as, or advertised as, or held out to be an enclosure where meals or lunches are furnished for gain or profit, to four or more transients who have sleeping accommodations upon the premises or to four or more boarders, other than hotels or private clubs.

C. Delicatessen: The term "delicatessen" shall mean any establishment where food, drink or refreshments are cooked,

prepared and sold for consumption other than on the premises.

D. Caterer: The term "caterer" shall mean any person who provides and prepares food, drink or refreshments together with utensils for the service of the same, for use and consumption on premises other than where prepared.

E. Food Handler: The term "food handler" shall mean any person who handles food or drink during the preparation or serving, or who comes in contact with any eating or cooking utensils.

F. Eating or Cooking Utensils: The term "eating or cooking utensils" shall include any kitchenware, tableware, cutlery, utensils, containers or other equipment with which food or drink comes in contact during preparation, serving or storage.

G. Health Officer: The term "health officer" shall mean the health authority of the City of Washington, District of Columbia or his authorized representative.

H. Person: The term "person" shall mean person, firm corporation, co-partnership or association.

Section 2. Approval by the Health Officer: No license to operate or conduct a restaurant, delicatessen or catering establishment wihtin the District of Columbia shall be issued unless the Health Officer shall certify that these regulations have been complied with and that each restaurant, delicatessen or catering establishment is provided with conveniently located separate toilets for male and female employees.

Section 3. Sanitary Requirements: The following sanitary regulations shall apply to all restaurants, delicatessens and catering establishments:

A. Floors: The floors of all rooms in which food or drink is stored, prepared or served, or in which utensils are washed, shall be of such construction as to be easily cleaned,

shall be smooth, and shall be kept clean and in a safe and sanitary condition. In the case of all new establishments, the kitchen floors shall be constructed of a material impervious to water and shall be provided with adequate and sufficient sewer drains to permit thorough cleansing.

B. Walls and Ceilings: Walls and ceilings of all rooms in which food or drink is stored, prepared or served, or in which utensils are washed or stored, shall be kept clean and in a safe and sanitary condition. The walls of all rooms in which food or drink is prepared or utensils are washed shall have smooth, washable surface and shall be finished in a color sufficiently light to permit at least 70% reflectance. In the case of all new establishments, all rooms in which food or drink is prepared or served or in which utensils are washed, shall have a clear ceiling height of not less than seven (7) feet.

C. Lighting: All rooms in which food or drink is stored, or prepared, or in which utensils are washed, shall be provided with adequate natural or artificial lighting. In the case of rooms in which food or drink is prepared or in which utensils are washed, adequate natural or artificial lighting shall be provided sufficient to produce an intensity of not less than fifteen (15) foot candles at thirty inches from the floor. In the case of rooms in which food or drink is stored, adequate natural or artificial lighting shall be provided sufficient to produce an intensity of not less than four (4) foot candles at thirty inches from the floor.

D. Ventilation: All rooms in which food or drink is prepared, or in which utensils are washed, shall be provided with facilities for at least eight air changes per hour; and in no case shall recirculation of air be permitted. All rooms in which food or drink is served shall be provided with facilities for at least five air changes per hour and not more than 50% circulation of air shall be permitted. All cooking units shall be hooded and vented to the outside air by forced draft; provided, however, that this latter re-

quirement shall not apply to simple bread toasters and coffee urns.

E. Doors and Windows: When flies are prevalent, unless other effective means are provided to prevent their access, all openings into the outer air shall be effectively screened and doors shall be self closing.

F. Water Supply: Running hot and cold water supply shall be easily accessible to all rooms in which food is prepared or utensils are washed, and shall be adequate and of a safe, sanitary quality.

G. Construction of Kitchens: The rooms in which food is prepared shall be of adequate size and construction to permit easy cleansing and the unhampered performance of all kitchen operations. Thirty inches of working space shall be required between all units of new equipment and in new establishments.

H. Construction and Location of Utensils and Equipment: All eating and cooking utensils and all show cases and display cases, or windows, counters, shelves, tables, refrigerating equipment and other equipment shall be so constructed and so located as to be easily cleaned and shall be kept clean and in a safe and sanitary condition. In new establishments or in establishments where new installations of equipment are made, a minimum of thirty (30) inches of working space shall be provided between counters, back bars and work tables wherever located.

No cooking unit of any kind shall be permitted to be placed or located in any bay window.

Shelves shall be constructed at least one-half (½) inch from wall, unless tightly stripped to eliminate all cracks.

I. Dishwashing Facilities: In all restaurants and catering establishments where dishwashing is done by other than mechanical means, a three compartment sink shall be provided, each sink having dimensions of not less than 16" x 16" x 14" and equipped with running hot and cold water,

with drainboard of material impervious to moisture affixed to each end of this unit. In addition, facilities shall be provided to secure sterilization of all common eating and drinking utensils.

J. Where mechanical dishwashing machines are used for sterilizing purposes, they shall be equipped so as to provide a minimum temperature of at least 180 degrees F. when in use for such purposes.

All delicatessens shall be provided with a sink of material impervious to water not less than 16" x 16" x 14" equipped with running hot and cold water.

K. Cleansing and Bactericidal Treatment of Eating and Cooking Utensils: All equipment, including display cases, windows, counters, shelves, tables, refrigerators, stoves, hoods and sinks, shall be kept clean. Beer coils shall be cleaned at least weekly and the time of such cleansing shall be kept posted. All cloths used by waiters, chefs and other employees shall be clean. Single-service containers shall be used only once.

All except single-service eating and drinking utensils shall be thoroughly cleansed and sterilized and shall at the time of service to the public be thoroughly clean and sterilized. All multi-use containers and utensils used in the preparation, cooking and serving of food and drink shall be thoroughly cleansed and sterilized immediately following the day's operations.

L. Storage and Handling of Utensils and Equipment: After cleansing and sterilizing treating, no utensil shall be stored, except in a clean dry place, protected from flies, dust or other contamination, and no utensil shall be handled except in such a manner as to prevent contamination, so far as practicable. Single-service utensils shall be purchased only in sanitary containers and shall be stored therein in a clean dry place until used.

Kitchens shall not be used for the storage of other than food products and kitchen or cooking or eating utensils and equipment in use.

M. Wholesomeness of Food and Drink: All food and drink shall be wholesome, unadulterated and free from spoilage. Milk shall be served in the original container in which it is received from the distributor. All shellfish shall be from sources approved by the United States Public Health Service. All cream dispensers shall be so constructed as to be readily cleansed. Sources of cream, milk and ice cream supplies shall be kept posted in accordance with the provisions of the Milk Act of February 27, 1925.

N. Storage and Display of Food and Drink: All food and drink shall be so stored and displayed as to be protected from dust, rodents, flies, vermin, handling, droplet infection, over-head leakage and other contamination. All catering establishments shall provide adequate and suitable facilities for the transportation of foods from the place of preparation to the place of serving.

The containers from which flour, sugar and other similar food products are dispensed in daily usage shall be provided with tight-fitting tops and shall be so constructed as to protect the contents from dust, dirt, insects and other contamination.

O. Rats and Vermin: All persons engaged in the operation of any restaurant, delicatessen or catering establishment shall be required to take all necessary precautions to keep the premises free from rats and vermin. In case of rat or vermin infestation, operators shall report such infestation to the Health Officer for the purpose of procuring proper advice and instructions in order to eliminate the nuisance.

P. Refrigreation: All perishable food or drink shall be kept at or below 45 degrees F. except when being prepared or served. Waste water from refrigeration equipment shall discharge into an open sink or drain properly trapped and sewer connection; provided, that where sewer connections are not available, clean adequate and water-ight drip pans shall be provided.

Q. Health of Employees: The Health Officer shall have full power and authority at any time to make such examinations and tests as may be necessary to determine whether any food handler has a disease in a communicable form or is a carrier of a communicable disease. It shall be the duty of all food handlers to submit to such examinations at the request of the Health Officer and any food handlers who shall refuse to submit to such examination shall not be employed or continued as a food handler in any of the establishments covered by these regulations.

No person knowing himself to be afflicted with disease in a communicable form shall work as a food handler in any of the establishments covered by these regulations. No operating proprietor or manager of any establishment covered by these rgeulations shall employ or continue to employ any person as a food handler if such operating proprietor or manager has reason to suspect such person is afflicted with disease in a communicable form.

R. Lavatory Facilities: All kitchens, stands and counters where food is prepared, shall be equipped with or have adjacent thereto separate hand-washing facilities for the washing and cleansing of the hands, equipped with running hot and cold water, soap and sanitary towels. The use of the common towel is prohibited. No employee shall return from a toilet room without first having washed his hands. Hand-washing signs shall be posted in each toilet room used by employees.

S. Cleanliness of Food Handlers: All food handlers shall wear clean garments and shall keep their hands clean at all times when engaged in the handling of food, drinking utensils or equipment. All female employees shall wear hair nets and all male employees shall wear caps while engaged in the preparation of food during working hours. All food handlers who in any manner come in contact with or handle food, shall before beginning work thoroughly wash their hands with soap and water. No food handler

shall be permitted to smoke while on duty, and engaged in the preparation, handling or serving of food.

T. Toilets: Every restaurant, delicatessen and catering establishment where male and female help is employed, shall be provided with separate toilet facilities for such male and female employees. Floors and walls of toilets shall be non-absorbent material. Toilet rooms shall not open directly into any room in which food or drink or utensils are handled or stored. All doors shall be self-closing. Toilet rooms shall be kept in a clean and sanitary condition, well lighted and ventilated. All toilets shall be equipped with hand-basins, provided with running hot and cold water, sanitary towels and tissue, and soap.

U. Garbage and Refuse: Adequate and sufficient garbage receptacles shall be provided, constructed of metal, watertight, and provided with a tight cover. All garbage, trash and waste material shall be stored in such a manner as not to become a nuisance.

V. Miscellaneous: (1) The surroundings of all restaurants, delicatessens and catering establishments shall be kept clean and free from litter and rubbish.

(2) No sleeping facilities or domestic activities shall be permitted in any room which is a part of or which opens into any room where food is prepared, stored or served, or in which utensils are washed or stored. Adequate lockers or dressing rooms shall be provided for the clothing of male and female employees. Soiled linens, coats and aprons shall be kept in vermin-proof containers provided for this purpose.

(3) No article, polish, or other substance containing any cyanide preparation or other poisonous material shall be used for the cleansing or polishing of eating or cooking utensils.

(4) All preparations used for the extermination of vermin, such as sodium fluoride, shall be colored conspicuously

and kept in containers clearly labelled "Poison". Such containers shall not be placed with receptacles containing spices or condiments, or other food substances.

(5) Cracked or chipped dishes and drinking utensils shall not be used, but shall be discarded.

(6) No persons shall bring or permit to be brought into the dining room, kitchen or storeroom of any restaurant, delicatessen or catering establishment, any dog, cat or other animal, except that a blind person led by a trained dog may bring in such dog.

(7) Sugar served to the public in all restaurants shall be dispensed from containers which provide protection of sugar against dirt, dust, other contamination and human handling at all times, except in the case of lump sugar, which is individually wrapped.

Section 4. Issuance of Manager's Certificate: Within ninety days following the promulgation of these regulations, every manager or operating proprietor of a restaurant, delicatessen or catering establishment in the District of Columbia, shall have obtained from the Health Officer a Manager's Certificate. Such certificate may be obtained by making application for the same at the Health Department and undergoing an examination before a board consisting of three persons; the chairman to be either the Director of Food Inspection of the Health Department or his assistant, and the other members to be persons employed in the Health Department and designated by the Health Officer. This examination shall be designed to test the applicant's proficiency in food and restaurant sanitation. All applicants successfully passing such examination shall be entitled to and shall be awarded the aforesaid Manager's Certificate which shall entitle the holder to manage any restaurant, delicatessen, or catering establishment in the District of Columbia. Any applicant who fails to pass such examination shall be entitled to a re-examination in thirty days.

It shall be unlawful for any person in the District of Columbia, after the enactment of these Regulations, to assume the management of any restaurant, delicatessen, or catering establishment, without having first qualified for a Manager's Certificate.

Section 5. Repealing Clause: All existing regulations or parts of regulations inconsistent with these regulations are hereby repealed.

Section 6. Penalties: Any person violating any of the provisions of these regulations shall upon conviction be punished by a fine of not more than $300.00.

Revocation of License: Violation of any of the provisions of these regulations or the failure to comply with any of the requirements thereof shall be ground for the revocation of any license issued hereunder for a restaurant, delicatessen, or catering establishment; Provided, however, that before any such license is revoked the licensee shall be given opportunity to answer and be heard upon the charges against him.

Section 7. Each section of these regulations and every part of each section is hereby declared independent of every other, and the holding of any section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof.

By Order of the Board of Commissioners, D. C.

/s/ G. M. THORNETT
Secretary to the Board

Official Copy Furnished

Judges
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P.D.
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Dir. of Inspection & Bldg. Insp.

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